



Hunt Corp. Commercial Real Estate Q&A: Dual agency - by David Hunt

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Q: We are in the process of hiring an exclusive broker to represent us in leasing office space for our new corporate headquarters. He mentioned the possibility of dual agency in handling this assignment. What is dual agency and how would it affect us?

A: Quoting from the New York Department of State, "Dual agency arises when a real estate broker or salesperson represents adverse parties (e.g. a buyer and seller) in the same transaction."

This is a very serious issue that requires close examination. If you hire an exclusive agent, you are acting as a principal. Your agent, by definition, is a fiduciary, whose fundamental duties include good faith, undivided loyalty, and full and fair disclosure. Further, from the Counsel's Office of the New York State Department of State: "Such duties are imposed upon real estate licensees by license law, rules and regulations, contract law, the principals of the law of agency, and tort law...The object of these rigorous standards of performance is to secure fidelity from the agent to the principal and ensure the transaction of the business of the agency to the best advantage of the principal." In other words, all actions undertaken by your agent, in word and deed, must be in your best interests.

As your exclusive agent, your broker must reveal to each property owner that he represents your interests, and not those of the property owner. His job is to obtain the best possible terms on your behalf. If your broker also exclusively represents the property owner (seller or landlord), the conflict is obvious. What is more subtle is a situation in which the property is exclusively represented by a salesperson or broker within the same firm as your broker. This is more likely with larger brokerage agencies. From the point of view of the law (and NYS Department of State), the brokers/salespersons are "one and the same" entity when determining dual agency conflict.

Remember that from the definition of agency comes the concept of undivided loyalty. Put simply, the same brokerage agency cannot represent both sides of the transaction unless a very explicit document is signed by both parties, acknowledging that, among other things, they are waiving their right to an agent's undivided loyalty.

Since fiduciary responsibility and undivided loyalty are two of the major reasons to hire an exclusive agent in the first place, I would recommend that you think long and hard about signing a document

that allows your agent to take actions that are not in your best interests. You are under no obligation to sign a dual agency agreement. This is so important. Let me repeat it: You are under no obligation to sign a dual agency agreement!

Since you have not yet hired your exclusive broker, one practical way to address this issue is to ask for a list of properties represented by the same agency. If any of those properties seem to meet your requirements, you will face the reality of dual agency, and may be better served by hiring a different brokerage agency.

Do you have a question regarding commercial real estate? Email your question to commercial real estate Q & A, at email@huntcorp.com for possible inclusion in a future column.

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